

Paul A. Kampmeier, WSBA #31560
KAMPMEIER & KNUTSEN PLLC
615 Second Avenue, Suite 360
Seattle, Washington 98104
Tel: (206) 223-4088 x 4
paul@kampmeierknutsen.com

Attorneys for Plaintiff Friends of the Earth

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FRIENDS OF THE EARTH, a District of
Columbia non-profit corporation,

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS, an
agency of the United States of America,

Defendant.

Case No. 2:18-cv-00677

COMPLAINT

INTRODUCTION

1. This is an action against the U.S. Army Corps of Engineers (“the Corps”) for violations of the Freedom of Information Act (“FOIA” or “Act”), 5 U.S.C. § 552, *as amended*. Under the judicial review provisions of both the FOIA and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706, Plaintiff Friends of the Earth (“Friends”) seeks relief regarding a FOIA request it submitted to the Corps on July 10, 2017 (“FOIA Request”) and regarding an administrative FOIA appeal it submitted to the Corps on August 31, 2017 (“FOIA Appeal”).

2. The purpose of the FOIA is “to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” S. Rep. No. 89-813, 1st Sess., at 3 (1965). The FOIA therefore requires federal agencies to disclose records in a timely manner to any person upon request unless the information falls within one of nine narrow disclosure exemptions in the Act. *See* 5 U.S.C. § 552(a)(3)(A), (b).

3. Federal agencies generally must determine within twenty business days whether requested records are exempt from withholding and, if they are not, the agency must promptly disclose the records to the requester. 5 U.S.C. § 552(a)(6)(A)(i); *id.* at § 552(a)(3)(A), (a)(6)(C)(i). If an agency makes an adverse determination on a FOIA request, the requester may appeal that determination to the agency, which must then make a determination on the administrative appeal within twenty days of receiving it. *Id.* at § 552 (a)(6)(A)(i)(III)(aa), (a)(6)(A)(ii).

4. Friends is filing this lawsuit because the Corps has failed to make and communicate the agency's final determination on Friends' FOIA Appeal, failed to make and communicate the disclosure determinations required by the FOIA for the responsive records in its possession, failed to act within applicable deadlines, and failed to provide Friends with an estimated date by which it would complete its response to Friends' FOIA Appeal.

5. The Corps is unlawfully withholding its final appeal determination, as well as the documents sought by Friends, documents to which Friends is entitled and for which no valid disclosure exemptions apply. Friends therefore seeks a declaration that the Corps has violated the FOIA and an order from the Court compelling the Corps to make the required determinations and disclosures by a date certain.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and

1 28 U.S.C. §§ 1331 (federal question), 1346 (United States as defendant), 2201 (declaratory judgment), and 2202 (further relief).

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3 7. This Court is the proper venue for this case because, pursuant to 5 U.S.C.
4 § 552(a)(4)(B), the records responsive to Friends' FOIA Request are located in this district and
5 because, under 28 U.S.C. § 1391(e), a substantial part of the events or omissions giving rise to
6 plaintiff's claims occurred in this district.
7

8 **PARTIES**

9 8. Plaintiff FRIENDS OF THE EARTH is a non-profit entity organized under Sec-
10 tion 501(c)(3) of the Internal Revenue Code, with its principal place of business in Washington,
11 D.C., and an office in Berkeley, California. Friends of the Earth is one of seventy-four national
12 member groups of Friends of the Earth International, a global network representing more than
13 two million activists around the world. In the United States, Friends advocates in the halls of
14 Congress, in state capitals, and with community groups around the country. With offices and
15 members in all fifty states, Friends urges policymakers to defend the environment and work to-
16 ward a healthy environment for all people.
17

18 9. The information Friends seeks from the Corps through its FOIA Request will fur-
19 ther Friends' mission as a non-profit environmental advocacy organization, in particular its ef-
20 forts in the Pacific Northwest to catalog and assess the risks from oil shipping terminals. Friends
21 disseminates information to educate the public on current environmental policy issues. Almost
22 all of Friends' staff members are engaged in disseminating information to the public. In addition
23 to press releases, Friends disseminates information through press briefings and radio and televi-
24 sion interviews. Friends also maintains a website that disseminates information about key envi-
25 ronmental issues to the public. Friends' staff members respond to questions from the public
26 about environmental issues and disseminate information in responding to those questions. They
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also distribute email messages with information on environmental issues several times per week; distribute letter mailings multiple times per year; release a quarterly “Newsmagazine”; and distribute information through multiple social networking sites and pages and at public events.

10. The above-described interests of Friends and its members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected by the Corps' disregard of its statutory duties under the FOIA and by the unlawful harm that results. The Corps' failure to fully implement the FOIA injures the interests of Friends and its members and the relief requested in this lawsuit can redress these injuries. These harms are traceable to the Corps' conduct and would be remedied by the relief sought in this action.

11. Defendant the UNITED STATES ARMY CORPS OF ENGINEERS is an administrative component of the United States Department of Defense. It is an agency of the executive branch of the United States government subject to the FOIA, pursuant to 5 U.S.C. § 552(f), and subject to the judicial review provisions of the APA, 5 U.S.C. §§ 701–702. The Corps is in possession or control of public records requested and sought by Friends.

STATUTORY BACKGROUND

12. The purpose of the FOIA is “to open agency action to the light of public scrutiny.” *U.S. DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (quoting *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)). “Congress believed that this philosophy, put into practice, would help ‘ensure an informed citizenry, vital to the functioning of a democratic society.’” *U.S. DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

13. The FOIA requires federal agencies to make records in their possession or control available to the public upon request unless one of the FOIA's nine specific exemptions applies. 5 U.S.C. § 552(a), (b)(1)–(9). Federal agencies bear the burden of demonstrating to a court that any

1 withholding of responsive records is consistent with the FOIA. 5 U.S.C. § 552(a)(4)(B). Even if
2 an agency meets its burden to prove that a responsive record contains information that is exempt
3 from disclosure, the agency must nevertheless disclose any non-exempt information if it can be
4 segregated from the exempt materials. 5 U.S.C. § 552(b).

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6 14. FOIA Exemption 5 (“Exemption 5”) allows, but does not require, federal agencies
7 to withhold records that are “inter-agency or intra-agency memorandums or letters which would
8 not be available by law to a party other than an agency in litigation with the agency.” *Id.*
9 § 552(b)(5). Courts have interpreted Exemption 5 to incorporate several common law discovery
10 privileges that apply to the government in litigation, including, *inter alia*, documents covered by
11 the deliberative process privilege. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975);
12 *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1082, 1084 n.1 (9th Cir. 1997).

13
14 15. To ensure a requester receives all requested documents, the FOIA requires agen-
15 cies to conduct a search that is reasonably calculated to uncover all records responsive to the re-
16 quest. 5 U.S.C. § 552(a)(3)(C)–(D).

17 16. The FOIA imposes strict and rigorous deadlines on federal agencies. The FOIA
18 requires a federal agency that receives a FOIA request to determine whether the requested rec-
19 ords are exempt from disclosure under 5 U.S.C. § 552(b) and to communicate that determination
20 to the requester within twenty business days. *Id.* § 552(a)(6)(A)(i). If the agency determines the
21 requested records are exempt from public disclosure, the agency must also communicate to the
22 requester that they have a right to appeal that determination. *Id.* If the agency determines the rec-
23 ords are not exempt from public disclosure, the agency is required to make the requested records
24 “promptly available” to the requester. *Id.* § 552(a)(3)(A), (a)(6)(C)(i).

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26 17. If an agency makes an adverse determination on a FOIA request, the requester
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1 may appeal that determination to the agency, which must then make a determination on the ad-
2 ministrative appeal within twenty days of receiving it, absent unusual circumstances. *Id.*

3 § 552(a)(6)(A)(i)(III)(aa), (a)(6)(A)(ii).

4 18. In addition to imposing response deadlines, the FOIA also requires federal agen-
5 cies to communicate with requesters about the status of the agencies' efforts to respond to a
6 FOIA request. Specifically, the FOIA requires agencies to assign tracking numbers to each re-
7 quest that will take longer than ten days to process; to provide that tracking number to each per-
8 son making such a request; and to establish a telephone line or internet service that provides in-
9 formation about the status of a request to the requester, including an estimated date by which the
10 agency will complete its work. *Id.* § 552(a)(7). Courts have construed these provisions to include
11 a requirement that agencies, upon request, provide estimated completion dates to requesters. *See,*
12 *e.g., Sierra Club v. U.S. EPA*, 75 F. Supp. 3d 1125, 1146 (N.D. Cal. 2014) (“[T]he Court finds
13 that the EPA acted unreasonably when it failed to inform Plaintiffs of an estimated completion
14 date . . .”).
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17 19. A U.S. District Court has jurisdiction “to enjoin the agency from withholding
18 agency records and to order the production of any agency records improperly withheld from the
19 complainant.”
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21 20. Agency action under the FOIA is also subject to judicial review under the APA.
22 *Or. Natural Desert Ass’n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (violation of
23 the FOIA’s decision deadline constitutes agency action that is not in accordance with the law).
24 Under the judicial review provisions of the APA, district courts are authorized to compel agency
25 action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1). District courts must also
26 set aside any agency action found to be arbitrary, capricious, an abuse of discretion, not in ac-
27 cordance with law, or made without observation of required procedures. *Id.* § 706(2).
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STATEMENT OF FACTS

21. On July 10, 2017, Friends submitted a FOIA request to the Corps asking for the updated biological assessment that BP PLC (“BP”) submitted to the Corps for the Cherry Point Marine Terminal, an oil barge terminal located in Washington State.

22. By letter dated July 26, 2017, the Corps denied Friends’ FOIA Request, invoking FOIA Exemption 5. The Corps stated that it was withholding the Biological Evaluation Friends requested (“the BE”) in its entirety because it was pre-decisional and part of the Corps’ deliberative process under Section 7 of the Endangered Species Act, 16 U.S.C. §1536.

23. The BE is not a federal agency document. The Corps did not prepare the BE. No other federal agency prepared the BE.

24. BP hired a consultant to prepare the BE. The consultant that BP hired prepared the BE. BP and its consultant were not acting as government employees would when they drafted the BE.

25. The Corps did not hire BP, or BP’s consultant, to prepare the BE. No other federal agency hired BP, or BP’s consultant, to prepare the BE.

26. The Corps did not request BP, or BP’s consultant, to prepare the BE. No other federal agency requested BP, or BP’s consultant, to prepare the BE.

27. The Corps did not solicit BP, or BP’s consultant, to prepare the BE. No other federal agency solicited BP, or BP’s consultant, to prepare the BE.

28. BP is the applicant and proponent of the Cherry Point Marine Terminal.

29. BP and any consultant working for BP were private actors communicating with the government, in pursuit of BP’s own interests, when they wrote and submitted the BE to the Corps.

30. BP’s interests might be affected by government action addressed in the BE.

1 31. The Corps submitted the BE prepared by BP's consultant to the U.S. Fish and
2 Wildlife Service as part of the consultation process under Section 7 of the Endangered Species
3 Act, 16 U.S.C. § 1536. The Corps submitted the BE prepared by BP's consultant to NOAA's Na-
4 tional Marine Fisheries' Service as part of the consultation process under Section 7 of the Endan-
5 gered Species Act, 16 U.S.C. § 1536.

6 32. The BE is not subject to any privilege that prevents disclosure of it to Friends.

7 33. Disclosure of the BE to Friends would not harm the Corps.

8 34. By letter dated August 31, 2017, Friends filed an administrative appeal of the
9 Corps' denial of its FOIA Request. Among other things, Friends challenged the Corps' applica-
10 tion of Exemption 5 to the BE and the Corps' failure to disclose reasonably segregable portions
11 of the BE.
12

13 35. Having not received any acknowledgement or response from the Corps regarding
14 Friends' FOIA Appeal, by letter dated October 31, 2017, Friends informed the Corps that it was
15 in violation of the FOIA's deadline requirements and offered to assist the Corps with resolving
16 the FOIA Appeal. Friends' October 31, 2017 letter explained that Friends was not exercising its
17 legal option to file suit under the FOIA to compel compliance with FOIA's deadline and disclo-
18 sure requirements because Friends preferred a cooperative approach to resolving its concerns.
19 Friends' October 31, 2017 letter requested that that the Corps respond to the letter and provide
20 Friends with an estimated date by which the Corps would resolve the FOIA Appeal or disclose
21 the BE.
22

23 36. The Corps did not contact Friends in response to the October 31, 2017 letter. The
24 Corps did not provide Friends with an estimated completion date after receiving Friends' Octo-
25 ber 31, 2017 letter.
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27 37. By letter dated December 8, 2017, Friends again informed the Corps that it was in
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1 violation of the FOIA and again offered to assist the Corps in any way possible to facilitate its
2 response to the FOIA Appeal and the disclosure of the BE. Friends' December 8, 2017 letter
3 again requested an estimated completion date.

4 38. By letter dated December 12, 2017, the Corps acknowledged that it received
5 Friends' FOIA Appeal on September 7, 2017 and assigned the FOIA Appeal tracking number
6 FP-17-024279. The Corps had not previously provided Friends with a tracking number for the
7 FOIA Request or Appeal. The Corps' December 12, 2017 letter explained that the Corps had for-
8 warding Friends' FOIA Appeal to another office for adjudication but did not provide Friends with
9 an estimated date by which the Corps would respond to the FOIA Appeal.
10

11 39. As of the date Friends filed this lawsuit, the Corps had not contacted Friends
12 about the FOIA Appeal since December 12, 2017.
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14 40. The deadline for the Corps to issue the final determinations required by 5 U.S.C.
15 § 552(a)(6)(A)(ii) for Friends' FOIA Appeal has passed. As of the date this action was filed, the
16 Corps had not provided Friends with the determinations required by 5 U.S.C. § 552(a)(6)(A)(ii)
17 for Friends' FOIA Appeal. As of the date this action was filed, the Corps had not provided
18 Friends with an estimated date by which Friends would make the final determinations required
19 by 5 U.S.C. § 552(a)(6)(A)(ii) for Friends' FOIA Appeal.
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21 41. As of the date Friends filed this lawsuit, the Corps had failed to provide Friends
22 with any written notice setting forth any unusual circumstances that would justify extension of
23 the deadlines set forth in 5 U.S.C. § 552(a)(6)(A)(ii) for Friends' FOIA Appeal. As of the date
24 this action was filed, the Corps had not provided sufficient written notice to Friends of any un-
25 usual circumstances that might warrant the actual delay that occurred in responding to the FOIA
26 Appeal.
27

28 42. As of the date Friends filed this lawsuit, the Corps had failed to provide Friends

1 with the records, or reasonably segregable portions of the records, that are responsive to Friends'
2 FOIA Request.

3 43. As of the date Friends filed this lawsuit, the Corps had failed to make promptly
4 available to Friends the records, or reasonably segregable portions of the records, that are respon-
5 sive to Friends' FOIA Request.

6 44. As of the date Friends filed this lawsuit, the Corps had not provided Friends with
7 an estimated date by which the Corps would disclose to Friends the records, or reasonably segre-
8 gable portions of the records, that are responsive to Friends' FOIA Request.

9 45. The Corps is currently withholding from Friends non-exempt documents that are
10 responsive to Friends' FOIA Request and that Friends sought through its FOIA Appeal. None of
11 FOIA's nine exemptions to mandatory disclosure apply to the documents the Corps is currently
12 withholding from Friends. The Corps has no legal basis for withholding the records that Friends
13 sought via the FOIA Request.

14 46. As of the date this action was filed, the Corps had constructively denied Friends'
15 FOIA Appeal.

16 47. Prior to filing this action Friends fully exhausted all administrative remedies re-
17 quired by the FOIA. 5 U.S.C. § 552(a)(6)(A), (a)(6)(C).

18 48. Friends has been required to expend costs and to obtain the services of a law firm
19 to prosecute this action.

20 49. The filing of this lawsuit was necessary to compel the Corps to make the determi-
21 nations required by 5 U.S.C. § 552(a)(6)(A)(ii) for Friends' FOIA Appeal. The filing of this law-
22 suit was necessary to compel the Corps to provide a written deadline by which it would make the
23 determinations required by 5 U.S.C. § 552(a)(6)(A)(ii) for Friends' FOIA Appeal.

24 50. The filing of this lawsuit was necessary to compel the Corps to disclose the non-
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1 exempt documents that are responsive to Friends' FOIA Request and FOIA Appeal.

2 51. The Corps could have made the determinations required by 5 U.S.C.
3 § 552(a)(6)(A)(ii) for Friends' Appeal before Friends filed this lawsuit. The Corps could have
4 disclosed the records responsive to Friends' FOIA Request before Friends filed this lawsuit. The
5 Corps could have provided Friends with written estimated completion dates for these actions be-
6 fore Friends filed this lawsuit.

7
8 52. Friends claims for relief in this Complaint are not insubstantial.

9 53. No exceptional circumstances exist that would allow this Court to allow the Corps
10 more time to review and disclose requested record. The Corps has not exercised due diligence in
11 responding to Friends' FOIA Appeal. The delays at issue in this case result from a predictable
12 agency workload of FOIA requests and/or appeals. The Corps has not made reasonable progress
13 in reducing its backlog of pending requests and/or appeals.

14
15 54. The circumstances surrounding the withholdings raise questions regarding
16 whether agency personnel acted arbitrarily or capriciously with respect to the withholdings at is-
17 sue in this case.

18 55. Based on the nature of Friends' professional activities, Friends will continue to
19 employ the FOIA's provisions in information requests to the Corps in the foreseeable future.
20 Friends' professional activities will be adversely affected if the Corps is allowed to continue vio-
21 lating the FOIA's disclosure provisions. Unless enjoined and made subject to a declaration of
22 Friends' legal rights by this Court, the Corps will continue to violate the rights of Friends to re-
23 ceive public records under the FOIA.

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CAUSES OF ACTION

CLAIM 1

**VIOLATIONS OF THE FREEDOM OF INFORMATION ACT
IN RESPONDING TO FRIENDS' AUGUST 31, 2017 ADMINISTRATIVE APPEAL:
VIOLATION OF THE DECISION DEADLINES IN THE FOIA**

56. Friends hereby incorporates by reference the allegations in the preceding paragraphs.

57. Friends has a statutory right to have the Corps process Friends' FOIA Appeal in a manner that complies with the FOIA. The Corps violated Friends' rights in this regard when the Corps unlawfully delayed its response to Friends' FOIA Appeal beyond the deadlines imposed by the FOIA.

58. The Corps violated and is violating the FOIA by failing to respond to Friends' FOIA Appeal by the deadline set forth in 5 U.S.C. § 552(a)(6)(A)(ii).

59. The Corps' violations of the FOIA with respect to its response to Friends' FOIA Appeal entitle Friends to an award of reasonable attorneys' fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E).

CLAIM 2

**VIOLATION OF THE FREEDOM OF INFORMATION ACT:
UNLAWFUL CONSTRUCTIVE DENIAL/UNLAWFUL WITHHOLDING**

60. Friends hereby incorporates by reference the allegations in the preceding paragraphs.

61. Friends has a statutory right to the records, or portions of records, it seeks. There is no legal basis for the Corps to withhold the records responsive to Friends' FOIA Request and FOIA Appeal.

62. The Corps has violated and is violating Friends' rights by unlawfully withholding

1 non-exempt documents responsive to Friends' FOIA Request and FOIA Appeal. The Corps' ac-
2 tions in response to Friends' FOIA Request and FOIA Appeal constitute constructive and/or un-
3 lawful denials of Friends' FOIA Request and FOIA Appeal.

4 63. The Corps' violations of the FOIA with respect to its response to Friends' FOIA
5 Request and FOIA Appeal entitle Friends to an award of reasonable attorneys' fees and other liti-
6 gation costs pursuant to 5 U.S.C. § 552(a)(4)(E).
7

8 CLAIM 3

9 VIOLATIONS OF THE FREEDOM OF INFORMATION ACT:
10 FAILURE TO PROVIDE ESTIMATED COMPLETION DATE

11 64. Friends hereby incorporates by reference the allegations in the preceding para-
12 graphs.

13 65. The FOIA requires the Corps to assign Friends' FOIA Appeal an individualized
14 tracking number, provide that tracking number to Friends, establish a phone line or internet ser-
15 vice that provides information about the status of Friends' FOIA Appeal, and provide Friends
16 with an estimated date by which the Corps will complete its response to Friends' FOIA Appeal.
17

18 66. Friends repeatedly asked the Corps for an estimated date of completion for
19 Friends' FOIA Appeal.

20 67. The Corps repeatedly violated the FOIA by failing to provide Friends with an es-
21 timated date of completion for Friends' FOIA Appeal.

22 68. The Corps' failure to provide Friends with an estimated completion date entitles
23 Friends to an award of reasonable attorneys' fees and other litigation costs pursuant to 5 U.S.C. §
24 552(a)(4)(E).
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CLAIM 4

(In the alternative to Claims 1 through 3)

VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT:
FAILURE TO COMPLY WITH THE FOIA IN RESPONDING TO
FRIENDS' ADMINISTRATIVE APPEAL AND FOIA REQUEST

69. Friends hereby incorporates by reference the allegations in the preceding paragraphs.

70. The Corps violated the FOIA by, at a minimum: (a) failing to make the determinations on Friends' FOIA Appeal as required by 5 U.S.C. § 552(a)(6)(A)(ii); (b) failing to disclose, and to disclose promptly, non-exempt documents subject to Friends' FOIA Request and FOIA Appeal; and (c) failing to provide Friends with an estimated completion date for the Corps' responses to Friends' FOIA Appeal.

71. Each and every allegation in this claim four is a separate violation of the FOIA for which this Court can provide relief to Friends under the APA. Making the determinations required by 5 U.S.C. § 552(a)(6)(A)(ii) on Friends' FOIA Appeal; making responsive documents available, and promptly available, to Friends; and providing Friends with an estimated completion date for the FOIA Appeal are all final agency actions unlawfully withheld or unreasonably delayed that this Court can compel under the APA, 5 U.S.C. § 706(1).

72. Alternatively, the Corps' decisions not to make the determinations required by 5 U.S.C. § 552(a)(6)(A)(ii); not to make responsive documents promptly available to Friends; and not to provide an estimated completion date are final agency actions that are arbitrary, capricious, an abuse of discretion, not based on substantial evidence in the record, not in accordance with the law, or otherwise in violation of the APA, 5 U.S.C. § 706(2), because among other things those actions do not comply with the FOIA or the Corps' regulations or policies.

73. Friends is entitled to relief under the APA and to costs of litigation and reasonable

attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

PRAYER FOR RELIEF

WHEREFORE, Friends respectfully requests that the Court:

A. Adjudge and declare that the Corps has violated the FOIA for the reasons set forth above;

B. Order the Corps to comply immediately with the FOIA by providing Friends with the required determinations, estimated completion dates, and non-exempt public records subject to Friends' FOIA Request and FOIA Appeal;

C. Declare that Friends is the prevailing party and/or substantially prevailing party in this matter; that the position of the government in this action was not substantially justified; and that there are no special circumstances that make an award of costs and reasonable attorneys' fees to Friends unjust;

D. Award Friends its reasonable attorneys' fees and litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E) and/or award Friends its reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation, under the Equal Access to Justice Act, 28 U.S.C. § 2412;

E. Grant Friends such additional relief as the Court may deem just or proper.

DATED this 10th day of May 2018.

s/ Paul A. Kampmeier
Paul A. Kampmeier, WSBA #31560
Kampmeier & Knutsen, PLLC
615 Second Avenue, Suite 360
Seattle, Washington 98104-2245
Tel: (206) 223-4088 x 4
paul@kampmeierknutsen.com

Attorneys for Friends of the Earth